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286-233—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 816

NATHAN SUESS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 845

VINCENT SCHWENOHA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 7072–7075; Pet. No. 816 App. B; Pet. No. 845 App. B) is reported at 383 F. 2d 395.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1967. In No. 816, a petition for

rehearing was denied on October 16, 1967, and a petition for a writ of certiorari was filed on November 14, 1967. In No. 845, a petition for rehearing was denied on October 26, 1967, and the petition for a writ of certiorari was filed on November 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the stock sold by petitioners was exempt from the registration requirements of the Securities Act.

2. Whether the district court erred by not instructing the jury with regard to the statute of limitations.

3. Whether the district court's charge to the jury contained reversible error (No. 845 only).

STATUTES INVOLVED

15 U.S.C. 77b (Section 2 of the Securities Act of 1933) provides in pertinent part:

> When used in this subchapter, unless the context otherwise requires—
>
> * * * * * *
>
> (4) The term "issuer" means every person who issues or proposes to issue any security * * *;
>
> * * * * * *
>
> (11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any secu-

rity, or participates or has a direct or indirect participation in any such undertaking * * *. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

15 U.S.C. 77c (Section 3 of the Securities Act of 1933) provides in pertinent part:

> (a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:
>
> (1) Any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days * * *.

15 U.S.C. 77d [1] (Section 4 of the Securities Act of 1933) provides in pertinent part:

> The provisions of section 77e of this title shall not apply to any of the following transactions:
>
> (1) Transactions by any person other than an issuer, underwriter, or dealer; transactions

[1] The excerpt from 15 U.S.C. 77d is printed as it appeared between 1954 and 1964.

by an issuer not involving any public offering * * *.

15 U.S.C. 77e (Section 5 of the Securities Act of 1933) provides in pertinent part:

> (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> * * * * *
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Southern District of New York, under five counts of an indictment charging that they and others[2] conspired to send, and did send, unregistered common stock of the Belmont Oil Corporation through the mails for purposes of sale or delivery after sale, in violation of Section 5(a) of the Securities Act of 1933, 15 U.S.C. 77e(a). On March 7, 1967, petitioner Suess was fined a total of $1,500 and was sentenced to imprisonment for fifteen months on each of the five counts, the sentences to run concurrently (R. 1998). Petitioner Schwenoha was fined a total of $2,500 and was sentenced to five concurrent

[2] Prior to trial, ten of the individual codefendants entered pleas of guilty. The charges against five corporate codefendants were severed. One individual codefendant was tried with petitioners, but the jury was unable to reach a verdict as to his guilt.

terms of three years' imprisonment (R. 1997). The court of appeals affirmed the convictions.

In 1956, petitioner Schwenoha acquired all the outstanding stock—350,000 shares—of the Belmont Divide Mining Corporation, an assetless enterprise which had been defunct for over thirty years (R. 85–87, 190, 192). Schwenoha thereafter engaged one Joel Fox, a customer's man in a Los Angeles brokerage house, to find a buyer for the company (R. 187–190).

In the fall of 1957, Schwenoha and Fox entered into an agreement with a Dr. James Boren, under which Belmont Divide would change its name to Belmont Oil Corporation and Boren would transfer certain oil leases of unspecified value to the corporation in return for 300,000 shares of its outstanding stock and one-half of a proposed new issue of 325,000 shares. Schwenoha and Fox were to divide the remaining 50,000 outstanding shares and to receive the other half of the proposed issue. Schwenoha and Fox were to arrange for the sale of the Belmont stock to the public (R. 89–96, 191–196). When Boren asked about the requirement of registering the stock, Schwenoha told him not to worry about it; that he "had a lawyer who would write a letter saying that since this company * * * had been originally organized prior to the 1933 Securities * * * Act that the stock could be sold to the public without registration" (R. 91, 194). Schwenoha suggested that "for further safeguard against any possible trouble" the stock be placed in the names of nominees, "so that no individual will appear * * * to own as much as ten percent of this stock" (R. 91, 95–96). It was also agreed to split the stock ten for one in order

to have more shares to sell to the public (R. 97, 196–197).

Thereafter the original 350,000 shares were registered in the names of nominees of Schwenoha, Fox, and Boren, the nominees endorsed the certificates in blank and returned them to the owners, and the shares were split ten for one (R. 98–106, 108, 196, 206–207).[3]

In February 1958, Schwenoha and Fox asked Boren to turn over to the company some additional oil leases "to help the sale of the stock." Boren delivered some leases, the value of which was not discussed, in return for 1,750,000 shares of the newly-issued split shares (R. 108–109).

In the spring of 1958, Schwenoha introduced Fox to petitioner Suess (R. 202). Suess thereafter met with two representatives of a New York brokerage firm, described himself as the "public relations man for Belmont Oil," and proposed that the firm maintain a market in Belmont Oil stock and sell the stock to the public (R. 607–609). Suess later returned to the brokerage firm with Schwenoha and Fox, and Schwenoha turned over to the firm 100,000 shares of Belmont Oil stock which had been registered in the names of Schwenoha's nominees. The firm gave Schwenoha notes for $25,000, to be redeemed as the firm sold the stock (R. 213–218, 609–615). The firm then sold the shares to the public at prices ranging between seventy-five cents and one dollar a share (R. 616).

[3] The certificates representing the new issue, as opposed to those representing the original 350,000 (later 3,500,000) shares, were placed in escrow in a bank and were not sold to the public (R. 131–132).

In September 1958, Suess asked Fox for some publicity material to aid the New York brokerage firm in selling Belmont stock. Fox and Schwenoha drafted a letter falsely reporting the recent acquisition of California oil leases by the company. Suess, who knew that no such acquisitions had taken place, delivered the letter to the firm. A few weeks later the firm requested more stock to sell to the public, and Schwenoha delivered another 50,000 shares (R. 509–511, 523–526, 615–616).

On October 13, 1958, Boren informed Schwenoha and Fox that an injunction had been issued against him in connection with the sale of unregistered stock of another company and that he wanted to sever his connections with Belmont Oil (R. 112, 114, 368–371). When Schwenoha referred to the letter he had obtained from a lawyer stating that the Belmont stock was exempt from the registration requirements, Boren's attorney, a former S.E.C. lawyer, told Schwenoha and Fox that the opinion was not "worth the paper it was written on" and that any sale of Belmont stock by Fox or Schwenoha "would be a violation of Section 5 of the Securities Act" (R. 114, 372–373). Fox purchased Boren's entire holdings—over 1,000,000 shares of the split, original issue, and title to over 2,500,000 shares of the split, new issue which was being held in escrow—for $1,000 in cash and a note for $39,000[4] (R. 114, 118, 226–228, 372). Fox assumed the position of president of Belmont Oil, a title which previously had been held by Boren's son,

[4] No payments were ever made on the note (R. 117, 228).

and thereafter took care of the company's bills and correspondence under a partnership arrangement with Schwenoha (R. 99, 198, 200–204).

In late October 1958, Fox gave Schwenoha 724,000 shares to be sold by Schwenoha and Suess through various New York brokers, with an agreement that the proceeds would be divided among the three of them. They re-registered 300,000 of the shares in the name of a friend of Suess, who signed the certificates and immediately returned them (R. 231–237, 252–253, 669–672).

In November 1958, Schwenoha, Fox, and Suess met with a second New York City stockbroker who had expressed an interest in selling Belmont stock. The broker eventually sold some of the shares, and delivered to Suess a bank draft for $2,500 from the proceeds (R. 240–245).

In January 1959, Schwenoha sold 10,000 shares of Belmont stock at twenty-five cents a share to one Binstock, a New York broker who proposed to resell the shares on the market. Over the course of the next few months Binstock bought from Schwenoha and resold over 200,000 additional shares at an average resale price of about one dollar a share (R. 720–739, 759).

In the spring of 1959, Suess delivered 100,000 Belmont shares to a New Jersey stockbroker under an agreement that the broker would pay Suess at the rate of ten cents a share as he resold them (R. 224, 849–852, 907–912). The broker resold the shares to the public at prices of one dollar a share and more (R. 859).

In June 1959, Schwenoha and Fox induced one Thomas Craig to buy Fox's remaining Belmont shares on the basis of Schwenoha's statement "that he had a market going in Belmont Oil stock, that the stock was being sold by brokers in New York" at about one dollar a share. On July 20, 1959, Craig and Fox signed a contract of sale calling for the payment of $40,000 in return for over 3,000,000 Belmont shares. Craig never made the payment specified (R. 563–567).

Between July 14, 1959, and October of that year, on or about the dates specified in the counts upon which petitioners were convicted, various brokers to whom petitioners had delivered Belmont stock certificates mailed the certificates to their customers (R. 810, 894–895, 960–962).

ARGUMENT

1. There is no merit to petitioner's contention that the Belmont stock was exempt from the registration provisions of the Securities Act. Although Section 3(a)(1) of the Act exempts from registration any security which had been "sold or disposed of by the issuer or bona fide offered to the public" prior to 1933, it also provides that this exemption shall not apply to any subsequent "new offering of any security by an issuer or underwriter." The redistribution of substantial blocks of the original stock of the corporation in the circumstances of this case plainly constituted a new offering within the meaning of the statute. See *In the Matter of Ira Haupt & Com-*

pany, 23 S.E.C. 589; H. Rep. No. 85, 73d Cong., 1st Sess., p. 14. Since petitioner Schwenoha exercised control of Belmont (whether individually, or collectively with Boren and Fox), he was an "issuer" of its stock; since petitioners Suess and Schwenoha sold the stock in connection with its distribution, they were "underwriters." See 15 U.S.C. 77b(11); *Securities and Exchange Commission* v. *Culpepper,* 270 F. 2d 241 (C.A. 2). As noted by the court of appeals, "[t]he evidence is overwhelming that [petitioners] and others acted together to control Belmont Oil thoroughly and completely, and that they knew the stock they sold to various brokers would be resold to the public; in truth, that was their ultimate goal" (Pet. No. 816 App. B, p. 17; Pet. No. 845 App. B, p. 30).

2. Petitioners contend that the trial court erred by not instructing the jury with regard to the applicable five-year statute of limitations. They argue that the government's evidence showed that they personally had not committed the single overt act presented to the jury as evincing the conspiracy or the acts constituting the substantive offenses within the five-year period preceding the filing of the indictment on July 14, 1964. This argument was properly rejected by the court below. The broker's mailing of a certificate, charged in overt act number 25, occurred in the first week in August, 1959 (R. 810), and the mailings charged in the four substantive offenses (counts 2, 12, 17, and 18) occurred between July 14, 1959 and October of 1959 (R. 894–895, 960–962), all

within the five-year period.[5] The statute began to run as to petitioners for each offense from the date of those acts, whether committed by petitioners personally or by their co-conspirators or agents. *Fiswick* v. *United States,* 329 U.S. 211, 216; *Pinkerton* v. *United States,* 328 U.S. 640, 645–648; *United States* v. *Reina,* 242 F. 2d 302, 306–307 (C.A. 2), certiorari denied *sub nom. Moccio* v. *United States,* 354 U.S. 913; *United States* v. *Witt,* 215 F. 2d 580, 584 (C.A. 2), certiorari denied *sub nom. Talanker* v. *United States,* 348 U.S. 887.

Petitioner Schwenoha further argues that the lack of evidence of his active participation on or after July 14, 1959, established his withdrawal from the conspiracy prior to that date. Mere cessation of activity, however, without a communication of withdrawal to the co-conspirators or a disclosure to the authorities, is not enough to start the running of the statute. *Hyde* v. *United States,* 225 U.S. 347, 369; *United States* v. *Borelli,* 336 F. 2d 376, 388 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States,* 379 U.S. 960. In the absence of any evidence of such a communication or disclosure,[6] there was no occasion for the district court to instruct the jury, *sua sponte,* on the issue of withdrawal, and Schwenoha did not

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[5] The count specifying a mailing on July 14, 1959, five years to the day before the filing of the indictment, was within the five-year period. *Burnet* v. *Willingham Loan and Trust Company,* 282 U.S. 437.

[6] The record references set out in petitioner Schwenoha's petition (Pet. No. 845, p. 10) show no such communication or disclosure.

object to the instructions on this ground. See F. R. Crim. P., Rule 30.

3. Petitioner Schwenoha alleges that the district court's charge to the jury contained prejudicial error because it failed adequately to explain the statute and to include matters favorable to him in the resume of the evidence. Schwenoha also argues that the issue concerning his reliance on the lawyer's letter (stating that the stock was exempt from the registration requirements) was presented in such a way as to compel the jury to find that he had violated the statute (Pet. No. 845, pp. 21–24). None of these allegations has substance. The court carefully and accurately explained the meaning of the statute and its specific terms (R. 1598–1606), and it summarized the evidence favorable to Schwenoha at each relevant point (R. 1538–1539, 1541–1542, 1560–1563, 1565–1566, 1603). On the issue of Schwenoha's reliance on the lawyer's advice, the court merely instructed that the advice was incorrect to the extent that it stated a pre-1933 issue was entirely exempt from registration (R. 1561–1562). After the court had given its instructions to the jury, petitioner's attorney stated that his "only exception" was that the court seemed to have emphasized the government's evidence at the expense of the evidence presented by the defense (R. 1634). The court then charged the jurors that it had not attempted to review all of the evidence before them, but that all the evidence was to be considered in reaching their verdict (R. 1635).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

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